STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
Hon. Helene N. White, Presiding Judge

RICHARD ADAM KREINER,

Plaintiff-Appellee,

v. **Supreme Court No. 124120**

ROBERT OAKLAND FISCHER,

Defendant-Appellant.

Court of Appeals No. 225640
Lapeer County Circuit Court No. 98-026072-NI

BRIEF OF DEFENDANT-APPELLANT, ROBERT OAKLAND FISCHER

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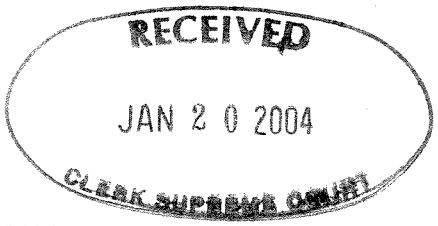

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STATEMENT OF JURISDICTION

Defendant-Appellant, ROBERT OAKLAND FISCHER, filed an application for leave to appeal from the Court of Appeals' opinion of June 3, 2003 (**77a**). By order of November 6, 2003, the Court granted the application, thus vesting jurisdiction in the Court pursuant to MCR 7.302(F)(3).

QUESTION PRESENTED FOR REVIEW

DID THE COURT OF APPEALS ERRONEOUSLY CONSTRUE AND APPLY THE REQUIREMENT OF AN EFFECT ON THE PERSON'S "GENERAL ABILITY" TO LEAD HIS OR HER NORMAL LIFE BY FOCUSING ON ALTERED *PARTICULAR* ABILITIES RATHER THAN PLAINTIFF'S UNCHANGED *GENERAL* ABILITY TO LEAD HIS NORMAL LIFE, AND THEREBY ESTABLISH AN IMPROPERLY LOW TORT THRESHOLD THAT IS INCONSISTENT WITH THE INTENT OF THE STATUTE?

Defendant-Appellant FISCHER answers, "Yes."

Plaintiff-Appellee KREINER would answer, "No."

The Court of Appeals answered, "No."

STATEMENT OF FACTS AND PROCEEDINGS

This negligence action was brought by Plaintiff., ROBERT KREINER, to recover noneconomic damages for injuries he claims to have sustained in a motor vehicle accident on November 28, 1997. Contending that Defendant FISCHER was at fault for causing the accident, Plaintiff filed this case on October 9, 1998, under MCL 500.3135, which limits tort liability for noneconomic loss arising from automobile accidents to those cases in which "the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1).

The trial court granted Defendant's motion for summary disposition under MCR 2.116(C)(10), holding pursuant to MCL 500.3135(2)(a) that Plaintiff's alleged injuries did not result in a serious impairment of body function. On Plaintiff's appeal the Court of Appeals reversed, construing the statute to hold as a matter of law that the facts Plaintiff presented, if accepted as true in the trial court, would meet the "serious impairment of body function" threshold. On Defendant's application for leave to appeal, this Court vacated the Court of Appeals' opinion and remanded the case for further review, whereupon the Court of Appeals reiterated and expanded upon its initial analysis and reached the same conclusion as before. The matter is now before this Honorable Court for review on leave granted.

Factual Background -- Plaintiff's Injury and Its Effects

Plaintiff's claim is that the accident resulted in chronic pain in his low back and right hip. His diagnosis is "lower back pain secondary to lumbar strain and L4 radiculopathy, degenerative disc disease" (**41a-42a** -- Dr. Fram deposition, pp. 22, 25, 27).[1]

The accident occurred on November 28, 1997. An EMG test (electromyography) on April 13, 1998, was positive for "mild irritation to the right L4 nerve root (right L4 radiculopathy)" (**10a** -- Dr. Fram office note, 4/13/98). To determine whether the nerve irritation might be "related to [a] disc herniation or disc fragment at L4-5" (*id.*), Plaintiff also underwent an MRI test (magnetic resonance imaging) on April 17, 1998.

The test revealed no evidence of disc herniation, but did show degenerative disc disease (narrowing of disc space) at L5-S1, and mild degenerative disc disease at L3-4 and L4-5, along with spondylolisthesis ("in layman's language, like arthritis changes") (**40a** -- Dr. Fram deposition, p. 20; **11a** -- Lapeer Hospital MRI Report, 4/17/98). As Dr. Fram explained, "when you read the whole [MRI] report, it did show that very much the whole lumbar spine was affected with degenerative changes and spondylolisthesis [arthritis]" (**40a**, pp. 20-21). Such degeneration, he explained, could be naturally occurring, or could have been caused or aggravated by trauma or by heavy lifting (**43a-44a**, pp. 30, 34).

Plaintiff's doctor testified that the disc and arthritic changes in Plaintiff's back would be permanent, but that the nerve irritation and resulting radiculopathy was something that can

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[1] All documents and exhibits collected in Defendant-Appellant's Appendix and referenced in this brief were submitted below as exhibits to the parties' summary disposition motions and briefs.

heal over time (**43a** -- Dr. Fram, pp. 30-31). Indeed, an independent medical examination conducted at the request of Plaintiff's no-fault insurer, which included an EMG/nerve conduction study on September 23, 1998, was entirely negative for radiculopathy (**23a**).

Plaintiff was never hospitalized for his injuries, and overall he sought only sporadic medical assistance. It consisted of four early visits to his regular physician, five visits over the course of a year and a half to his neurologist, and a three week course of physical therapy in September, 1998 (**29a** -- Plaintiff's deposition, p. 19; **41a** -- Dr. Fram deposition, pp. 23-24).

At the scene of the accident on Friday, November 28, 1997, Plaintiff made no complaints of injury and sought no medical attention of any kind that day. He first visited his regular doctor on the following Tuesday, December 2, 1997, with pain in his right leg and back. Although the doctor detected "tenderness" in the hip area, Plaintiff's range of motion was normal. The findings were the same in the three follow-up visits through the end of January, at which time Plaintiff's neurological examination was still normal. The treatment during this initial period consisted of cortisone injections, anti-inflammatories and advice to use a heating pad (**5a-8a** -- Dr. Madhu notes, 12/02/97 - 1/26/98).

By referral from his regular doctor, Plaintiff presented to neurologist Dr. Fram on April 13, 1997, who conducted the EMG test discussed above and then ordered the MRI test for April 17, 1997. On Plaintiff's return visit of May 12, 1998, Dr. Fram rendered his diagnosis of "lower back pain secondary to lumbar strain and L4 radiculopathy, degenerative disc disease" (**13a** -- Dr. Fram note, 5/12/98). He explained the results of the EMG ("the only finding on the EMG testing was mild irritation to the right L4 nerve root") (**40a** -- Dr. Fram deposition, p. 20) and MRI ("in layman's language, like arthritis changes") (**40a**, p. 18).

Plaintiff was given a steroid injection and a prescription of pain medication for use as needed. Regular back exercises, muscle strengthening and daily walks were also prescribed -- "you know, routine instructions for back cases" (**40a-41a** -- pp. 19-22).

Plaintiff was reexamined at his scheduled three-month follow-up visit to Dr. Fram on August 10, 1998, and found to be unchanged: "Very much the same; mild to moderate stiffness at the lumbosacral junction. Straight leg raising triggered pain at sixty-five degrees on the right side." The doctor's diagnosis likewise remained the same. (**41a**, p. 23). This time Dr. Fram prescribed a three week, three times per week course of physical therapy, which Plaintiff completed. He reported to Dr. Fram on October 9, 1998, that the therapy was not helpful (**29a** -- Plaintiff's deposition, p. 19; **15a** -- Dr. Fram note, 10/9/98). Again Plaintiff was advised to continue home back exercises and daily walks as tolerated, and to return for "followup evaluation in two months or sooner if the necessity arises" (*id.*).

Plaintiff's next, and last, visit to Dr. Fram was nearly a year later, on August 6, 1999, just before Dr. Fram's deposition of August 24, 1999. Plaintiff had indicated at his own deposition in June, 1999, that he was no longer treating with anyone, was not taking any medication for his injury, and had not taken any medication for it since the previous December, 1998 (**29a** -- Plaintiff's deposition, p. 19). Dr. Fram's impression on August 6, 1999, was still unchanged,[2] and he continued to recommend exercise and walks. Noting Plaintiff's work in construction, Dr. Fram, for the first time, advised Plaintiff to avoid excessive bending, twisting

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[2] The reference in Dr. Fram's note to an MRI examination "from 8/17/99" apparently is a typographical error and should have identified the date of the MRI as April 17, 1998, as the date of the note itself is only August 6, 1999 (**34a**) and the records do not suggest that Plaintiff ever had a second MRI.

and heavy lifting. He also recommended use of a back support garment during daily activity (**34a** -- Dr. Fram note, 8/6/99).

Plaintiff was 36 years old at the time of his deposition, and had been self-employed as a carpenter-construction worker for 12 years. He testified that he does a wide variety of projects for individual homeowners, such as home remodeling, decks, siding, electrical work, roofing, drywall work, plumbing and some sheet metal or mechanical work (**25a** -- Plaintiff's deposition, pp. 3-5).

From the date of the accident onward, Plaintiff has continued his construction work as a self-employed carpenter. He agreed that his work remains steady year-round and that his routine has been to spread his work evenly over time as opposed to having intense 60-70 hour weeks mixed with low 10-20 hour weeks (**30a** -- Plaintiff's deposition, p. 25). He complains that his ability to work has slowed, however, such that he typically works a 6 hour day rather than an 8 hour day, although he also finds that a longer lunch break to "get off my feet for a while" helps him work longer (**31a, 33a**, pp. 24, 36).

Plaintiff's income from his construction business did not suffer from his injury. Comparison of his tax records from the two years prior to his accident to the two years of and after his accident revealed that Plaintiff's best income years were the years of and immediately following his accident, with his highest business earnings coming in 1998, the first full year after the accident (**52a** -- Kreiner Income Chart, Exhibit 2 to Defendant's Reply Brief in Support of Motion for Summary Disposition, supported by Plaintiff's tax returns submitted as Exhibit 6 to Defendant's Motion for Summary Disposition and Exhibit 9 to Plaintiff's Response to Motion).

Plaintiff also complains that his ability to lift loads on the job has decreased as a result of his injury:

> Q: All right. And lifting of any sort?
>
> A: I can do lifting. I have to watch what I lift. If I get into trying to lift something heavy, it hurts.
>
> Q: And how do you define something heavy?
>
> A: Anything much over 80 pounds or something like that. I am guessing.
>
> * * *
>
> Q: Did you lift things 80 pounds prior to hurting your back?
>
> A: Could I? Oh, yes.
>
> Q: Did you ever, on a regular basis?
>
> A: Not on a regular basis, but I did.

(**29a**, pp. 20-21). Similarly, Plaintiff complains that too much uninterrupted work on a ladder -- anything over 20 or 30 minutes at a time -- causes pain in his back, although he does it anyway: "Yeah, I have to. I force myself to do it." (**30a**, p. 23).

Filed below in support of Defendant's Motion for Summary Disposition (Exhibit 7) (and specially submitted as part of the record on appeal) are two several hours long video tapes in the nature of a "day in the life" film of Plaintiff on a construction job (November 4, 1999). They show Plaintiff building an addition to a residential home.

The Court is strongly urged to review lengthy excerpts of these tapes, if not their entirety. Plaintiff is seen throughout the work day climbing up and down extension ladders, driving nails, tearing off old siding material with a hammer, reaching, lifting entire roof trusses

-- sometimes with the assistance of the homeowner holding one end but most often by himself, crawling on the garage roof, up and over the peak, and reaching down under the overhang to hammer a new truss in place. Whether Plaintiff is experiencing pain during these activities cannot be known, but there is never any appearance of limping or back-holding, facial grimaces or any other signs of pain. Importantly, in his deposition of June 9, 1999, Plaintiff stated that his level of activity has remained essentially unchanged from the first week after the accident (**31a** -- Plaintiff's deposition, p. 29).

Plaintiff has also asserted, and the Court of Appeals relied in part on the proposition, that the accident has impacted Plaintiff's favored recreational activity of hunting. His testimony reveals the essential extent of this impact:

A: I do a lot of hunting.

Q: And what kind of hunting do you do?

A: I -- am a real avid deer hunter. I do a lot of walking there. And rabbit hunting, I used to do a lot of walking there.

Q: Have you deer hunted or rabbit hunted since this accident?

A: Oh, yes.

Q: So last year you did get a deer hunting licence?

A: Yes.

Q: And you went deer hunting?

A: Yes.

Q: And you did both bow and rifle?

A: Yes.

Q: Did you get a deer?

A: Yes.

Q: What about rabbit hunting, did you do rabbit hunting last fall?

A: No.

Q: Is there a separate license for rabbit hunting?

A: Yes.

Q: Do you bird hunt?

A: I used to.

Q: All right. When did you stop bird hunting?

A: Well, there ain't no birds hardly.

Q: I assume that was before the accident you stopped bird hunting?

A: Yes.

* * *

A: The biggest problem I have with deer hunting is the walking to and from the deer blind.

Q: How far does it take to walk to a deer blind ... your particular deer blind?

A: Mine is, like I want to say, a half to three-quarters of a mile.

Q: And when you walk that half to three-quarters of a mile, how does that effect [sic] you?

A: I have a lot of pain in my hip and in my leg.

(**29a-30a, 32a**, pp. 21-23, 33).

Apart from its effect on his construction work and the above-described pain brought on by walking too far while hunting, Plaintiff was unable to identify any other aspects of his life

affected by his injury (**31a-33a** -- Plaintiff's deposition, pp. 29-30, 34). His ability to do household chores is unchanged from before the accident, and he is able to go shopping with his wife just as before. Nor does Plaintiff contend that the accident resulted in any changes to his family or social life. (*Id.*).

Proceedings Below

Plaintiff filed his lawsuit on October 9, 1998. Discovery consisted essentially of obtaining the records of the accident and Plaintiff's treatment, Plaintiff's deposition in June of 1999, obtaining Plaintiff's earnings records and the video-tape evidence, and Dr. Fram's deposition in August of 1999.

Defendant filed his motion for summary disposition on December 21, 1999, asserting under MCL 500.3135(2)(a) that Plaintiff's injuries did not rise to the level of a "serious impairment of body function." Plaintiff opposed the motion, contending that there was a material question of fact on the nature and extent of Plaintiff's injuries (Plaintiff's Response to Defendant's Motion, 1/12/00, p. 2 -- "Wherefore" clause). The motion was heard by Circuit Judge Nick O. Holowka and decided on January 24, 2000.

The court ruled in favor of Defendant, relying largely on factors such as Plaintiff's continuous employment and relative lack of disability:

> THE COURT: . . . The determinative factor in this case is **whether Plaintiff's claimed impairment is serious enough** to have impinged upon his ability to lead a normal life.
>
> In the case of *Chumley versus Chrysler*, [156 Mich App 474; 401 NW2d 879 (1986)], the same issue was before the court.

There, the court found that the question of whether or not the plaintiff could work [was] dispositive of the matter; the court stated:

'In our opinion, the inability of this plaintiff to engage in employment that requires lifting, bending, twisting, prolonged standing, or prolonged sitting is tantamount to an inability to engage in any employment. Therefore, there is a factual dispute regarding plaintiff's physical restrictions limiting his ability to work which is material to the determination of whether she has suffered a serious impairment of body function.'

In this case Plaintiff has been and continues to be employed in the same work he was engaged prior to the accident.

While somewhat restricted, the Plaintiff in this case is able to engage in lifting, bending, twisting, and standing that is required by his job. Furthermore, he continues to engage in his favorite recreational activity which is hunting.

Based on these facts, Plaintiff is hard-pressed to show how his alleged impairment is serious enough to affect his normal life.

Further, this Court finds that under the factors enumerated in *Harris* [*v Lemicex*, 152 Mich App 149; 393 NW2d 559 (1986)], the claimed injury is not serious. Here, Plaintiff's treatment is limited to wearing a back support garment and taking muscle relaxants and painkillers. He has not been actually physically disabled at any time, and the duration of his injury is intermittent.

Finally, his own doctor has stated that there is a chance the damaged root will heal completely.

For these reasons the Court finds that as a matter of law **the impairments** for which Plaintiff claims he suffers from **do not impinge in any real sense in his ability to lead a normal life.** Therefore, he is not entitled to maintain this action in tort against the Defendant under the No-Fault Statute, MCL 500.3135(1).

(**65a-67a** -- Tr 1/24/00, pp. 9-11) (emphasis added).

Plaintiff filed a claim of appeal from the ensuing order granting Defendant's motion for summary disposition entered February 9, 2000 (**70a**).

The Appellate Proceedings

In the course of the Court of Appeals' first review in this matter, Defendant filed as exhibits to his Brief on Appeal copies of the November, 1999, video tapes, which also had been submitted to the trial court. Plaintiff moved to have the video tapes stricken from the Court of Appeals' record, on grounds that the trial court apparently had not viewed them. The Court of Appeals denied the motion to strike (Court of Appeals Order, 10/2/00).

Oral arguments were heard on April 11, 2002, after which the Court issued its first of two opinions on May 31, 2002. *Kreiner v Fischer*, 251 Mich App 513; 651 NW2d 433 (2002) (**72a-75a**). The Court reversed the trial court's grant of summary disposition.

The opinion cited *Kern v Blethen-Coluni*, 240 Mich App 333, 341-342; 612 NW2d 838 (2000), for the general proposition that the "serious impairment of body function" inquiry generally is to be decided as a question of law under MCL 500.3135(2) (251 Mich App at 515 -- **72a-73a**), but nowhere referred to *Kern*'s "nonexhaustive list of factors" that are to be considered in determining whether the impairment of body function is "serious" enough to meet the no-fault tort threshold. *Kern*, 240 Mich App at 341. An even more recent published opinion, *Miller v Purcell*, 246 Mich App 244, 248; 631 NW2d 760 (2001), which likewise directly addressed the element regarding the ability to lead one's normal life and reaffirmed *Kern*'s factors for determining "whether the impairment of an important body function is *serious* within the meaning of MCL 500.3135(7)" (emphasis in original) was not cited at all by the Court of Appeals.

Rather, relying exclusively on the definition portion of the text of MCL 500.3135(7), the Court first noted and agreed with the circuit court's determination that Plaintiff had satisfied the elements of an "objectively manifested impairment" and the involvement of "an important body function." In considering whether the injury resulted in an impairment that "affect[ed] the person's general ability to lead his or her normal life," however, the Court of Appeals held the trial court to have erred not only in concluding that the impairment was not "serious enough" to meet the threshold, but to have erred in even making such an inquiry part of the determination. *Kreiner*, 251 Mich App at 518 (*see*, **74a** -- slip op., at 3).

The Court concluded, based on Plaintiff's testimony that his ability to work and, to a lesser extent, to hunt, had been affected by his injuries, a "serious impairment of body function" had been established as a matter of law. Whether there was evidence to counter Plaintiff's evidence so as to create a genuine issue of material of fact would be determined on remand in the circuit court; if not, summary disposition would be granted in favor of Plaintiff on the issue of serious impairment of body function. *Kreiner*, 251 Mich App at 519 (*see*, **75a** -- slip op., at 4).

On Defendant's application for leave to appeal, in lieu of granting leave, this Court entered an order vacating the Court of Appeals' opinion and remanding the case for further consideration (**76a** -- Order, 6/3/03). The Court held that both of the lower courts erred. "Although a *serious* effect is not required, *any* effect does not suffice either. Instead, the effect must be on one's *general* ability to lead his normal life."[3] (**76a** -- emphasis in original). On

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[3] Close review of the circuit court's ruling reveals that Judge Holowka never held that there must be a "serious effect." Rather, his explicitly stated inquiry was "whether Plaintiff's

remand, the Court of Appeals was directed to consider "whether plaintiff's impairment affects his general ability to lead his normal life" (*id.*).

In its opinion on remand, issued June 3, 2003, *Kreiner v Fischer (On Remand)*, 256 Mich App 680; 671 NW2d 725 (2003) (**77a-83a**), the Court of Appeals acknowledged that the precise issue to be addressed, per this Court's directive, regards "the meaning of the phrase 'affects the person's general ability to lead his or her normal life.'" 256 Mich App at 687 (**81a** -- slip op., at 5), then the Court of Appeals, in material part, merely reiterated its first opinion, indicating, "we believe that we addressed this issue in our prior opinion" (*id.*).[4] Focusing on certain particulars within Plaintiff's various tasks as a self-employed builder, the Court again considered evidence that Plaintiff can only do ladder work for 20 minutes at a time, that he can lift no more than 80 pounds, that he purportedly cannot do roof work, and that he can no longer work an 8 hour day. 256 Mich App at 687 (**81a** -- slip op., at 5) (*quoting*, 251 Mich App at

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claimed ***impairment*** is *serious enough* to have impinged on his ability to lead a normal life" (**65a-66a**) (emphasis added), and his conclusion, focusing subjectively on the activities of plaintiff's own life, was that "Plaintiff is hard-pressed to show how his alleged ***impairment*** is *serious enough* to affect his normal life" (**66a**) (emphasis added). Defendant submits that the circuit court's holding, that "the *impairments* for which Plaintiff claims he suffers from ***do not impinge in any real sense in his ability*** *to lead a normal life*" (**67a**) (emphasis added), fairly addresses the inquiry of whether the person's "*general* ability" has been affected.

[4] What the circuit court actually ruled, it must be emphasized, is distorted by the Court of Appeals' opinion, where it picks up on language in this Court's remand order and expands upon it to imply that Judge Holowka applied a wrong standard. "Our Supreme Court, in its remand order, clearly indicated its agreement with our conclusion that a *serious* effect on a person's general ability to lead his or her normal life is not required under MCL 500.3135(7)." 256 Mich App at 686 (**81a** -- slip op., at 5) (underlined emphasis added). To be fair to the circuit court, at no time did Judge Holowka suggest that a threshold showing requires a "serious" effect (or any other similarly described "effect") on the person's general ability to lead their normal life. As detailed previously (*see*, n. 3), Judge Holowka's inquiry was whether the "*impairment*" was serious enough to qualify as a serious impairment of body function, based on how that impairment impacted, in an overall sense, the plaintiff's ability to lead his life. There is no error, Defendant submits, in such an inquiry.

518-519). The opinion again notes, too, that while Plaintiff still hunts recreationally, limits on his ability to walk long distances prevent him from going rabbit hunting (*id.*).

The Court of Appeals did, however, expand on its view of the "general ability" element. The Court stated, "We find that one's general ability to lead his or her normal life can be affected by an injury that impacts the person's ability to work a job, where the job plays a significant role in that individual's normal life" (proceeding to note that virtually everyone's job plays a significant role in their life). 256 Mich App at 688 (**81a-82a** -- slip op., at 5-6). Based on the particular ways in which Plaintiff's ability to work is claimed to have been affected by his back condition, the Court concluded, again, that the limitations "are significant enough to support a finding that plaintiff's impairment affected his general ability to lead his normal life." 256 Mich App at 690 (**82a** -- slip op. at 6).

Defendant sought this Court's review of the Court of Appeals' decision by filing an application for leave to appeal on June 24, 2003. By order of November 6, 2003, the application was granted. The Court is now urged to reverse the judgment of the Court of Appeals, reinstate the circuit court's grant of summary disposition in favor of Defendant, and reestablish the statutory "serious impairment of body function" tort threshold as a meaningful, substantial bar to motor vehicle accident claims in which the person's ability to lead his or her normal life, in a broad, general sense, has not been impacted by the claimed impairment of body function.

INTRODUCTION

This automobile negligence action raises a central question within the no-fault act's tort threshold of "serious impairment of body function" under MCL 500.3135. Now before the Court is a question arising out of the text of §3135(7) -- the amended statute's definition of "serious impairment of body function" -- at what point does an impairment of a body function go from merely affecting the person's ability to lead his or her normal life to affecting the person's *general* ability to lead his or her normal life?

The Court is asked to examine the statutory text of and surrounding the clause at issue, as well as the manifest legislative purpose of the amendatory act in 1995 that added the subject definition to the statute, and provide a decisional framework for the lower courts to utilize in these cases. In so doing, the Court is asked to consider the facts of the case at bar and conclude that Plaintiff's claimed impairment, and its alleged effect on his *general* ability to lead his normal life, is not sufficiently "serious" to meet the no-fault tort threshold.d

The Court of Appeals' opinion in this case, *Kreiner v Fischer (On Remand)*, 256 Mich App 680; 671 NW2d 725 (2003) (**77a-83a** -- slip op.), Defendant submits, is materially flawed in both its construction and application of the amended statute's "general ability" element and leads not only to the wrong result in this case but to a substantially lower tort threshold in cases claiming a "serious impairment."

Plaintiff's position in the litigation has been that the adjective "serious," as used in the statutory phrase "serious impairment of body function," is essentially immaterial; that since §3135(7) explicitly tells what the whole phrase "means," courts may simply ignore the import

of the term "serious" in their construction and application of the definition phrase. The Court of Appeals essentially adopted Plaintiff's position.

It is submitted here, however, that the definition phrase should not be construed or applied in a vacuum; but that the words within the phrase (i.e., "general ability") should be interpreted in the context of the very word and phrase they are defining (i.e., "*serious* impairment of body function"). Had the Court of Appeals followed this approach, it would not have effectively read "seriousness" out of the "serious impairment" threshold, and it would not have needed to run and hide from binding Court of Appeals precedent (*Kern v Blethen-Coluni*, 240 Mich App 333, 341; 612 NW2d 838 (2000), and *Miller v Purcell*, 246 Mich App 244, 248; 631 NW2d 760 (2001)), but instead would have been guided by the "nonexhaustive list of factors" laid out in those cases to determine whether the threshold had been satisfied.

In light of the legislative purpose of establishing a high tort threshold that effectively reduces substantially the number of motor vehicle tort cases, Defendant submits that the decisional framework must be based on a requisite showing of substantial **duration** of the impairment, substantial **gravity** of the impairment, and substantial **pervasiveness** of the impairment's overall impact on the claimant's lifestyle so that, taken together, it may properly be said that the objectively manifested impairment of the body function at issue is one that "affects the person's *general* ability to lead his or her normal life." §3135(7).

In its opinions in the case at bar, however, the Court of Appeals neither adhered to the "nonexhaustive list of factors" set forth in *Kern* nor applied any other workable framework for determining when the effects of an impairment will be deemed sufficiently grave, pervasive and long-standing as to affect the person's "general ability to lead his or her normal life." The

Court gave lip service to the phrase "general ability," but actually focused on and identified altered *particular* abilities within Plaintiff's work life. In doing so, the Court overlooked (or perhaps more accurately, underlooked) Plaintiff's unchanged *general* ability to lead his normal life.

Plaintiff's injuries had an effect on his ability to work, but not such an effect as to disable him even for a day, or to decrease his earnings, or even to alter significantly the manner in which he earned his living. Plaintiff's ability to lead his recreational life likewise was affected, but not in such a way as to alter generally how he recreates -- Plaintiff was and remains an avid hunter. His *general* ability to lead his normal life, in other words, has not been affected by the impairment he claims to have incurred in this matter. This Court reverse the decision of the Court of Appeals and reinstate summary disposition in favor of Defendant.

STANDARD OF REVIEW

This matter was decided in the trial court on Defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). When a trial court is called on to decide such a motion in the context of an auto-negligence claim asserting the existence of a serious impairment of body function under §3135 of the No-Fault Act, it must consider all the evidence and determine whether there is any factual dispute concerning the nature and extent of the person's injuries or, if there is any factual dispute, whether the dispute is material to whether the person suffered a serious impairment of body function, as defined by the statute. MCL 500.3135(2)(a). *May v Sommerfield*, 239 Mich App 197, 199; 607 NW2d 422 (1999), *citing*, *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999).

Where there is no such material dispute of fact, the court is to determine as a matter of law whether the claimed injury rises to the level of a "serious impairment of body function." MCL 500.3135(7); *Kern v Blethen-Coluni*, 240 Mich App 333, 338; 612 NW2d 838 (2000). Appellate review of a trial court's grant or denial of a motion for summary disposition is de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Churchman v Rickerson*, 240 Mich App 223, 227; 611 NW2d 333 (2000). Further, questions of law and statutory construction, likewise, are reviewed de novo on appeal. *Adams Outdoor Advertising, Inc v City of Holland*, 463 Mich 675, 681; 625 NW2d 377 (2001); *Oakland Cty Bd of Road Comm'rs v Michigan Property & Casualty Guar Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998).

Accordingly, this Court's review of the ultimate issue, whether the plaintiff suffered a "serious impairment of body function" within the meaning of the statute, is de novo.

ARGUMENT

THE COURT OF APPEALS ERRONEOUSLY CONSTRUED AND APPLIED THE REQUIREMENT OF AN EFFECT ON THE PERSON'S "GENERAL ABILITY" TO LEAD HIS OR HER NORMAL LIFE BY FOCUSING ON ALTERED *PARTICULAR* ABILITIES RATHER THAN PLAINTIFF'S UNCHANGED *GENERAL* ABILITY TO LEAD HIS NORMAL LIFE, AND THEREBY ESTABLISHED AN IMPROPERLY LOW THRESHOLD INCONSISTENT WITH THE INTENT OF THE STATUTE.

This motor vehicle injury-accident case presents the Court with the question of whether a plaintiff's injuries and resulting functional difficulties were correctly held by the trial court as failing to meet the tort threshold of serious impairment of body function, within the meaning of the No-Fault Act. MCL 500.3135.

Under Michigan's No-Fault Automobile Insurance Act, persons injured in automobile accidents generally are intended to obtain recovery of benefits for their losses from the no-fault insurance system, without regard to fault. Correspondingly, the availability of tort remedies was abolished in part by the Legislature, preserving claims for damages only where "the injuries are severe enough." *Cassidy v McGovern*, 415 Mich 483, 506; 330 NW2d 22 (1982) (Kavanagh, J., concurring and dissenting); *Stephens v Dixon*, 449 Mich 451, 541; 536 NW2d 755 (1995).

In upholding the constitutionality of the no-fault act -- "an innovative social and legal response to the long payment delays, inequitable payment structure, and high legal costs inherent in the tort (or 'fault') liability system" -- this Court in *Shavers v Attorney General*, 402

Mich 554; 267 NW2d 72 (1978), concluded that the assurance of adequate and prompt reparations for economic losses, without regard to fault, was a fair and equitable trade-off for relinquishment of the traditional tort remedy. "Under this system, victims of motor vehicle accidents would receive insurance benefits for their injuries *as a substitute* for their common-law remedy in tort." 402 Mich at 579 (emphasis added).

Since its inception, tort liability for noneconomic losses arising out of automobile accidents has been abolished, under what is now MCL 500.3135(3), except for those that meet the statutory "threshold" of death, serious impairment of body function, or permanent, serious disfigurement. In abolishing pain and suffering claims based upon lesser injuries, the Legislature clearly recognized that actual loss would go uncompensated,[5] but simply reached the *policy* decision that it was more beneficial and, ultimately, more important, to provide for the recovery of *economic* losses (loss of earnings, medical bills, replacement services, etc.) -- promptly and without regard to fault -- than to allow for the pursuit of pain and suffering damages in all but the most seriously injured claimants. *Cassidy v McGovern*, 415 Mich 483, 499; 330 NW2d 22 (1982).

Thus, a plaintiff claiming noneconomic damages for injuries sustained in an automobile accident now can recover "only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1). As the Court of

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[5] *See, Cassidy v McGovern*, 415 Mich 483, 499; 330 NW2d 22 (1982), where this Court observed that "it is apparent that an injured person may suffer significant losses other than those for which the act guarantees recovery without regard to fault. For economic losses beyond those for which payment was assured, the traditional tort remedy was left intact. [MCL 500.3135(3)(c)] However, the tort remedy for noneconomic losses for which no payment was assured under the act was not left wholly intact."

Appeals has observed in its application of these tort threshold provisions, moreover, a liberal construction of these provisions in favor of recovery "is *not* warranted," given the remedial nature of the first-party benefits side of the no-fault system and the inherent trade-off underlying the system. *Churchman v Rickerson*, 240 Mich App 223, 229; 611 NW2d 333 (2000). *See*, *Shavers v Attorney General*, 402 Mich at 620-623.

As of 1996, when the 1995 amendments to §3135 went into effect, 1995 PA 222, the question of whether a person's injuries met the statutory no-fault tort threshold is one of law:

> The issues of whether an injured person has suffered a serious impairment of body function or permanent serious disfigurement are questions of law for the court to decide if the court finds either of the following:
>
> (i) There is no factual dispute concerning the nature and extent of the person's injuries.
>
> (ii) There is a factual dispute concerning the nature and extent of the person's injuries, but the dispute is not material to the determination as to whether the person has suffered a serious impairment of body function or permanent serious disfigurement. . . .

MCL 500.3135(2)(a).

The amendment thus legislatively overruled *DiFranco v Pickard*, 427 Mich 32; 398 NW2d 896 (1996), in taking the inquiry of whether a plaintiff sustained a threshold injury from the jury and returning it to the court, where this Court had placed it in *Cassidy v McGovern*, 415 Mich 483; 330 NW2d 22 (1982). *See*, *Kern v Blethen-Coluni*, 240 Mich App 333, 338; 612 NW2d 838 (2000), *quoting*, House Legislative Analysis, HB 4341, 12/18/95 (**55a** - final House legislative analysis).

The amendment also largely incorporated the additional elements the *Cassidy* Court had articulated for determining whether the impairment at issue was sufficiently "serious" to meet the tort threshold. These amendments have been described as "overrid[ing] *DeFranco* [*v Pickard,* 427 Mich 32; 398 NW2d 896 (1986)] and present[ing] a much more formidable hurdle for plaintiff[s]." *Paisley v Waterford Roof Truss, Ltd*, 968 F Supp 1189, 1194, n 8 (ED Mich, 1997); *accord*, *Churchman*, 240 Mich App at 231 (the amended statute "was intended to raise or strengthen the no-fault threshold"). At issue here is the statutory definition for "serious impairment of body function":

> As used in this section, "serious impairment of body function" means an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life.

MCL 500.3135(7).

Applying this provision, the trial court in this case was called on to determine whether a viable claim was presented by a self-employed construction worker in his mid-thirties who was injured in an automobile accident. The nature of his scene-of-the-accident complaints (he had none), post-accident treatment (four days afterwards he presented at his doctor's office with leg pain, with very sparse, minor treatment thereafter) and impact on his daily life (he suffered no interruption in his work at all, nor any decrease in annual earnings, but claims to work fewer total hours and to have certain restrictions as to what construction work he can accept because of difficulty with roof work) have been detailed. These factors were properly considered by the trial court, Defendant submits, as not being "of sufficient gravity" (*see*, *Cassidy*, 415 Mich at 502-503) (that is, the overall effect of the impairment was not "serious

enough") as to warrant a conclusion that Plaintiff suffered a "serious impairment of body function" (**66a-67a**).

As noted, statutory construction is a question of law that the Court reviews de novo. *Adams Outdoor Advertising, Inc v City of Holland*, 463 Mich at 681. The "cardinal principle" of statutory construction is that courts must give effect to legislative intent. *Dressel v Ameribank*, 468 Mich 557, 562; 664 NW2d 151 (2003). Where the plain and ordinary meaning of the statutory language is clear, judicial construction is normally neither necessary nor permitted. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

Where reasonable minds can differ about the meaning of a statute, however, judicial construction is appropriate. *Adrian School Dist v Michigan Pub School Employees' Retirement System*, 458 Mich 326, 332; 582 NW2d 767 (1998). In that event, the Court should consider the object of the statute, the harm it was designed to remedy, and apply a reasonable construction that best accomplishes the statute's purpose. *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 644; 513 NW2d 799 (1994).

The precise question of statutory interpretation presented in this case concerns the meaning of "general" as it is used to modify the word "ability" within the statutory definition for "serious impairment of body function." MCL 500.3135(7). Such was the directive given by this Court to the Court of Appeals in its remand order (**76a**), and the Court of Appeals, to be sure, was correct in citing *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002), for the "*foremost* rule of statutory construction [being] that courts are to effect the intent of the Legislature." *Kreiner (On Remand)*, 256 Mich App at 683 (**79a** -- slip op., at 3).

Yet that manifest intent is to be "derived from the words of the statute itself," *Roberts*, *supra*, and the word "serious" is a critical part, Defendant submits, of the statute at issue.

In its construction of the term, "general" (appearing as an adjective in the phrase "impairment ... that affects the person's *general* ability to lead his or her normal life"), the Court thus should seek to "give effect to every word ... in [the] statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002). Indeed, construction of an undefined word (such as "general") within a definitional phrase should be interpreted in the context of the words or phrase it is defining. *Cf.*, *Rednour v Hastings Mutual Ins Co*, 468 Mich 241, 250, n. 2; 661 NW2d 562 (2003). Here, the phrase being defined is "*serious* impairment of body function." The repeated use of the term "serious" throughout §3135 permits and, indeed, requires, the Court to give effect to the word consistently throughout §3135. *Accord*, *Sanchick v State Board*, 342 Mich 555, 559; 70 NW2d 757 (1955) (in seeking meaning, the words and clauses of a statutory provision are not divorced from those which precede and those which follow).

In §3135, as amended, the adjective "serious" appears in the context of three different phrases: the "*serious* impairment of body function" threshold, the "permanent, *serious* disfigurement" threshold, and the provision stating that in closed head injury cases a question of fact fo the jury is established by a showing of "*serious* neurological injury." §3135(2)(a)(ii) (emphasis added). Notably, while the *phrase* "serious impairment of body function" is statutorily defined, §3135(7), the word "serious" itself is not. In *Churchman*, *supra*, the Court thus resorted to the common usage of the term in the context of describing an injury, illness

or accident, as derived from Black's Law Dictionary, to hold that it means "'dangerous; potentially resulting in death or other severe consequences...' Black's Law Dictionary (7th ed), p. 1371. Accordingly, the plain language of the statute [§3135(2)(a)(ii)] requires some indication that the injury sustained by the plaintiff was severe." 240 Mich App at 230. Where a term appears throughout a same or similar statutory scheme, the court should construe the term consistently. *State Treasurer v Wilson*, 432 Mich 138, 145; 377 NW2d 703 (1985); *Beach v State Farm Mutual Auto Ins Co*, 216 Mich App 612, 629; 550 NW2d 580 (1996).

Defendant thus submits that, in its task of articulating a standard that identifies when an impairment will be deemed to have "affect[ed] [a] person's *general* ability to lead his or her normal life," §3135(7) (emphasis added), the Court must construe the phrase so as to give meaning to the fact that it is a "*serious* impairment of body function" that is being defined.

The definitional phrase for "serious impairment of body function" should also be construed, Defendant submits, in the context of the other two no-fault tort thresholds with which it appears. This point was entirely missed by the Court of Appeals in this case, Defendant submits, but it was obvious to the Court in *Cassidy*:

> In determining the seriousness of the injury required for a "serious impairment of body function", this threshold should be considered in conjunction with the other threshold requirements for a tort action for noneconomic loss, namely death and permanent serious disfigurement. MCL 500.3135 []. The Legislature clearly did not intent to erect two significant obstacles to a tort action for noneconomic loss and one quite insignificant obstacle.

Cassidy, 415 Mich at 503 (emphasis added). Even prior to *Cassidy*, in making passing reference to all three prongs of the no-fault tort threshold, this Court in *Great American Ins Co*

v Queen, 410 Mich 73, 93; 300 NW2d 895 (1980), unanimously characterized the injury required for meeting the threshold as "severe" (consistent with *Churchman*, *supra*), when it said that claimants proceeding in a tort case "may sue the third-party tortfeasor for work loss exceeding that compensated by the no-fault carrier [and] for non-economic loss where injury is severe [.]" *Id.* (emphasis added).

Finally, the statutory definition of "serious impairment of body function" should be construed in the context of the Legislature's purpose in enacting the provision. *Dressel*, 468 Mich at 562; *Marquis*, 444 Mich at 644. It is an established fact that, while Michigan's first-party no-fault insurance system is extremely generous, it likewise is very costly. There also can be no denying the legislative concern for the escalating costs of the tort side of the no-fault automobile system in the wake of the Supreme Court's *DiFranco* decision in 1986. The trade-off that was so fundamental to the original concept of the no-fault insurance scheme (*Shavers*, *supra*) was becoming increasingly meaningless, to which the Legislature responded with the 1995 amendments:

> Michigan's no-fault law needs to be in balance. The system was designed so that drivers would be compensated from their own policies for economic losses stemming from damage done to person and property due to accidents, regardless of fault, in exchange for a strict limitation on lawsuits. The limitation on lawsuits was weakened by a 1986 state supreme court decision, and the no-fault statute needs to be restored to its condition prior to that decision.
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> * * *
>
> To the extent that these provisions would reduce the number of lawsuits and the amount paid out in pain and suffering awards, they will reduce the costs of the insurance system and help reduce or restrain insurance premium costs in the competitive auto insurance marketplace. The system now is too expensive; this is one way, and a fair way, to make insurance more affordable for

> more people. ... The combination of high no-fault benefits and easy access to tort litigation, with high jury awards and defensive out-of-court settlements, threatens the system; it will become unaffordable to ever more insurance customers.
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> * * *
>
> -- The expression "serious impairment of body function" must be understood in connection with the other tort thresholds, death and permanent serious disfigurement. <u>These are high standards</u>.

Final House Legislative Analysis, House Bill 4341; 1995 PA 22, pp. 2-3 (**54a-55a**) (emphasis added); *see*, *Kern*, 240 Mich App at 338 n. 1.

In accord with the clear legislative purpose of the 1995 amendments, of restoring the integrity of the "serious impairment of body function" threshold, the Court should note the vital role this threshold plays in the economic viability of the no-fault system. The Court should recognize that the *only* function served by this threshold is that of a sieve -- sorting the serious injuries from the non-serious or minor ones, the cases that should proceed to trial in the traditional tort system from those susceptible of swift and sure summary disposition. Any interpretation of the statutory threshold language that fails to eliminate *most* bodily injury claims from the tort system and that instead permits most cases to proceed to trial would completely subvert the one, and, indeed, *only*, purpose of the threshold provision.

In this context, then, the Court should construe §3135(7)'s requirement that the claimed impairment affect one's "*general* ability to lead his or her normal life" in such a way as to render the resulting "serious impairment of body function" a truly "*serious*" impairment; an impairment that affects a person's "*general ability* to lead his or her normal life" must be materially different than one that merely affects the person's "*ability* to lead his or her normal life." The plain meaning of the word "general" provides the basis for this distinction.

It is appropriate to examine the dictionary definition of the word "general" to derive and apply its plain and ordinary meaning. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002); *see*, *Churchman*, 240 Mich App at 228, *citing*, *Popma v Auto Club Ins Assoc*, 446 Mich 460, 469-470; 521 NW2d 831 (1994). "General" is defined as "pertaining to a whole or to most of its parts, not particular, not local ... prevalent, widespread ... concerned with main features and not with details[.]" Webster's Dictionary of the English Language, 1988 Edition (Lexicon Publications, Inc., NY), p. 396. Another dictionary defines the adjective "general" as follows:

> **general** *adj.* **1.** Concerned with, applicable to, or affecting the whole or every member of a class or category. **2.** Affecting or characteristic of the majority of those involved; prevalent. **3.** Being usually the case; true or applicable in most instances. **4.a.** Not limited in scope, area or application. **b.** Not limited to or dealing with one class of things; diversified. **5.** Involving only the main features rather than precise details.

The American Heritage College Dictionary, 3rd Ed. (Houghton Mifflin Company, Boston MA, 1997), p. 566 (emphasis added).

The plain and ordinary meaning of the term "general," in the context of examining what type of ability is affected by an impairment, thus does not allow for reliance on *particular* inabilities or difficulties in a person's life; yet it is clear that the Court of Appeals relied on such inabilities or difficulties. Had it not dispensed with the overriding criterion that an impairment be "serious" to satisfy the tort threshold, the Court would not have needed to run and hide from the precedent of *Kern v Blethen-Coluni*, *supra* (and *Miller v Purcell*, 246 Mich App 244; 631 NW2d 760 (2001)), but instead would have been guided by the "nonexhaustive list of factors" laid out in those cases to determine whether the threshold had been satisfied.

Kern, 240 Mich App at 341; *Miller*, 246 Mich App at 248. Such factors provide a decisional framework necessary for the courts (and others) to consistently and predictably assess each unique set of injury and life-effect facts against the "serious impairment" threshold.

As noted, the court in *Kern* relied on *Cassidy*-era case law to discern a list of factors to be considered by trial courts when deciding if an injury met the "serious impairment" threshold:

> In determining whether the impairment of the important body function is "serious," the court should consider the following nonexhaustive list of factors: extent of the injury, treatment required, duration of disability, and extent of residual impairment and prognosis for eventual recovery.

Kern, 240 Mich App at 341; *accord*, *Miller*, 246 Mich App at 248-249 (concluding that the plaintiff's "general ability to lead her normal life ha[d] not been significantly altered by her injury" although her hand injury prevented her from being able to knit and forced her to type one-handed at work).

The trial court in the case at bar did not yet have the benefit of these Court of Appeals' opinions, yet applied these very factors in granting summary disposition for Defendant (**64a-66a** -- Tr 1/24/00, pp. 8-10). Based principally on the medical evidence (nature of treatment) and the continuous nature of Plaintiff's post-accident construction work, the trial court found that Plaintiff's alleged impairment was not "serious enough" to meet the tort threshold of "serious impairment of body function."

The Court of Appeals, however, failed even to cite to the *Kern* factors and found the trial court to have erred in so considering the "seriousness" of the impairment. The Court rejected the notion that any such determination is required; instead, it strictly construed

§3135(7) as disallowing such an inquiry. Relying on the fact that the amended statute contains a provision that sets forth the elements of a "serious impairment of body function" without use of the word "serious" itself, it held that a court reversibly errs in deciding whether an impairment is "serious" enough as to affect the person's general ability to lead their normal life.

This Court then directed the Court of Appeals on remand to determine whether the Plaintiff's *general* ability to lead his normal life had been affected by his injury. While thus purporting to construe the phrase "*general* ability" in its analysis, however, the Court's inquiry actually focused on Plaintiff's altered *particular* abilities; had the Court stepped back and examined Plaintiff's *general* ability to lead his normal life, it would have observed that, in fact, it had not been affected.

The Court based its decision largely on a newly articulated standard under which, in essence, if the impairment has any effect on your work, it will be deemed to affect your "general ability to lead your normal life" and thus constitute a *serious* impairment of body function. The standard is ultimately arbitrary, creates an unacceptably *low* tort threshold, and clearly leads to the wrong result in this case:

> We find that one's general ability to lead his or her normal life can be affected by an injury that impacts the person's ability to work at a job, where the job plays a significant role in that individual's normal life, such as in the case at bar.

Kreiner (On Remand), 256 Mich App at 688 (**81a-82a**, slip op. at 5-6) (emphasis added).

Importantly, the Court's opinion immediately proceeds to state the obvious -- that a person's job virtually *always* plays a significant role in his or her life. *Id.* (**82a**). Thus, any

injury otherwise satisfying the elements of the tort threshold (shown to involve an important body function and to be objectively manifested) that in any way affects or "impacts" the person's ability to work would test positive under such a standard and constitute a serious impairment of body function. Such an arbitrary litmus test weighted so heavily in favor of meeting the "serious impairment" threshold would only serve to *lower* that threshold in contravention of the manifest intent of the 1995 amendment.[6]

In this case, Plaintiff's *general* ability to lead his normal life, when properly assessed, was not affected by his claimed impairment of body function, as the circuit court essentially held. There were effects on Plaintiff's ability to remain standing on ladders for lengths of time exceeding 20 minutes, but this was not shown to be nor even suggested as ever having been necessary in his usual construction work. Plaintiff's ability to work 8 or more hours per day

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[6] In relying so heavily in this case on the effect Plaintiff's injury had on his ability to perform certain particular tasks at work as warranting the conclusion in favor of "serious impairment of body function," 256 Mich App at 688 (**81a-82a** -- slip op., at 5-6), the Court of Appeals appears to have equated such limited effects on Plaintiff's work with an outright, total *loss* of the ability to work. "*Losing the ability to work* can be devastating;" ... "It would be illogical to conclude that *where a person loses the ability to work* due to an injury ... their life after the accident, in general, would be unaffected." *Id.*, at 688-689 (**82a**) (emphasis added). Manifestly, there has been nothing close to an outright "loss" of the ability to work in this case.

The Court of Appeals also cited the potential impact of financial losses flowing from one's inability to work due to injury as affecting the "general ability to lead" one's normal life: "There can be no doubt that the inability to work ... places monetary limits on daily and recreational activities. As such, an injury impacting employment can affect a person's life in general." 256 Mich App at 689 (**82a**). This is an improper inquiry, Defendant submits, because such an injured worker would be entitled to wage loss compensation under the first-party benefit system for up to three years after the accident (MCL 500.3107(1)(b)), and to the extent that those benefits would not fully compensate him, he would have the right to pursue his excess economic losses in a tort action without any threshold showing of injury. MCL 500.3135(3)(c). Citing the prospect of financial loss as a factor bearing on an injury's effect on the "general ability" to lead one's normal life is particularly inappropriate in this case, in light of Plaintiff's ability to have maintained the same earnings after the accident as before (*see*, **52a** -- Income Chart).

also was allegedly affected by his condition to the point of decreasing the length of his work day to as low as 6 hours (and allegedly by preventing him from doing "roof work" -- but see the video exhibits); yet Plaintiff missed not a single day of work, and was able to make necessary adjustments, in essence, to prevent his *general* ability to lead his normal life from being affected -- such that his *highest* revenues as a self-employed contractor occurred in the year of his accident and the first year following his accident. Nor did Plaintiff establish that any material change in his recreational, social or family life was effected by his injury.

A decisional framework, such as the one propounded by the Court in *Kern*, *supra*, is necessary as a basis for the trial courts, and the Court of Appeals, to build a body of precedent that will foster consistent and predictable results in claims of serious impairment of body function. While the Court of Appeals in *Kern* articulated a variety of factors as part of a "nonexhaustive list" (240 Mich App at 341), Defendant submits that ultimately there are three related criteria to be considered for determining whether a claimed impairment of body function is one that should be deemed to "affect[] the person's *general ability* to lead his or her normal life" (assuming the impairment is also shown to be an "important" one and is "objectively manifested") (§3135(7)): **gravity** of the impairment, **duration** of the impairment, and **pervasiveness** of the impairment.

Preliminarily, it is important to note, as did the Court of Appeals in *May v Sommerfield (After Remand)*, 240 Mich App 504; 617 NW2d 920 (2000), that the assessment of an accident-related impairment's effect on a person's ability to lead their life should be made by comparing that person's lifestyle before and after the accident. *Id.*, at 506. From a causation standpoint, it cannot be an impairment that "affects" one's general ability to lead their normal

life if there is no significant difference between the before and after pictures of the person's life.

The three related criteria Defendant posits as being central to the inquiry of whether there has been an effect on the person's "general ability to lead his or her normal life," gravity, duration and pervasiveness (described below), are the three logical dimensions of "the extent" of an impairment's potential effect on a person's ability to lead their normal life. Under §3135(2)(a)(i) and (ii), trial courts are to determine whether there is a factual dispute "concerning the nature and extent" of the person's injuries. The Court of Appeals has reasonably explained these two aspects as follows:

> In determining the "nature" of plaintiff's injuries, the trial court should make appropriate findings concerning whether ... plaintiff has an "objectively manifested" impairment and, if so, whether "an important body function" is impaired. In determining the "extent" of plaintiff's injuries, the trial court should make appropriate findings concerning whether ... the impairment affects plaintiff's "general ability to lead his ... normal life.

May v Sommerfield, 239 Mich App 197, 203; 607 NW2d 422 (1999); *Miller v Purcell*, 246 Mich App at 247 (emphasis added). Examination of the gravity, duration and pervasiveness of an impairment's effect on a person's functional abilities will reveal the "extent" to which it "affects the person's general ability to lead his or her normal life."

The **duration** of the impairment addresses the dimension of time -- for how long (what portion of the person's life) has the impairment affected, or will it affect, the person's ability to live their normal life? In line with the high tort threshold mandated by the language and purpose of the amended statute, Defendant submits that, all other factors being equal, the

duration must be considerable. While it is true that "an injury need not be permanent to be serious" (*Cassidy*, 415 Mich at 505), it must be equally true that an impairment that materially impacts a person's lifestyle only for a short time would seldom, if ever, be of sufficient duration to conclude that the person's *general* ability to lead his or her normal life has been affected.

The **gravity** of the impairment addresses the dimension of intensity, or magnitude -- at any given point in time, to what extent is the particular impairment at issue impacting the person's functional abilities? Again, before the person's ability to lead his or normal life can be said to be affected, *generally*, the impact must be considerable; in other words, all other factors being equal, the difference between the person's functional abilities pre-accident and post-accident must be striking.

The **pervasiveness** of the impairment addresses the dimension of breadth -- at any given point in time, how pervasive is the impact of the impairment on the person's overall life? While total disability usually would not be required, a person who remains able, generally, to lead the life he or she led prior to the accident should not meet the "serious impairment" threshold. A person's abilities may be affected in various particular ways -- i.e., adaptations or accommodations are made in how the person works or in the manner in which they perform chores or engage in recreational activities, but where the person is able, after recovery from their acute injuries, to return to employment that is the same or similar to the person's pre-accident employment, and is able, likewise, to resume the same or similar recreational activities as before the accident, then it should not be said that the person's *general* ability to lead his normal life has been affected.

These three dimensions are essentially consistent with, and conceptually inform, the factors identified in *Kern*, *supra*: "extent of the injury, treatment required[7], duration of disability, and extent of residual impairment and prognosis for eventual recovery." 240 Mich App at 341.

In Mr. Kreiner's case, consideration of the factors set forth above leads only to the conclusion that there is no material factual dispute in this case: the impairment of body function on which Plaintiff's claim is based has not been shown to affect Plaintiff's *general* ability to lead his normal life. In terms of **duration**, the low back and leg pain resulting intermittently from the L5-S1 "mild radiculopathy" allegedly still persisted through August of 1999, more than a year-and-a-half post-accident (**34a** -- Dr. Fram note, 8/6/99), and it was uncertain if and when the irritated nerve root would heal (**43a** -- Dr. Fram, p. 31).

In terms of **gravity** and **pervasiveness** of the impairment, however, Plaintiff's claim falls conclusively short of establishing a serious impairment of body function. Quite simply, at *no* time was the impairment of Plaintiff's back function ever so grave as to render him disabled from doing his work, even for a day, or even to alter substantially the nature of work in which he engages. Nor have other aspects of his life been affected with any substantial gravity so as to weigh in favor of an overall effect on his *general* ability to lead his normal life. Plaintiff was and has remained an avid hunter as his primary avocation (**30a-31a** -- Plaintiff's deposition, pp. 21-23), and no other aspect of Plaintiff's normal life -- household chores,

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[7] This factor, the "treatment required" for the injuries, seems to bear on the seriousness of the injury but not necessarily on the seriousness (or "extent") of the resulting *impairment* on the body function at issue. The factor identified as "extent of the injury" is somewhat vague, but may be regarded as equivalent either to our posited "gravity" or "pervasiveness" factors. The remaining *Kern* factors appear to be functions of a combination of "duration" and "gravity".

shopping with his wife, family and social life -- is claimed to have been impacted to any extent whatsoever by the impairment at issue (**31a-33a**, *id.*, pp. 29-30, 34).

In the end, the circuit court not only reached the right result but was correct in its analysis, as well, in considering how Plaintiff's overall lifestyle had been largely unaffected by his injury, and concluding, "Plaintiff is hard-pressed to show how the alleged impairment is *serious enough* to affect his normal life" (**66a** -- Tr 1/24/00, at 10) (emphasis added). The analysis fully comports with a conclusion that Plaintiff's impairment did not affect his "general ability" to lead his normal life.

Accordingly, in its consideration of this case, the Court should provide the appropriate decisional framework to be followed by the lower courts in serious impairment cases, and apply that framework here to reverse the decision of the Court of Appeals and reinstate the order of summary disposition in favor of Defendant.

RELIEF REQUESTED

For all the foregoing reasons, Defendant-Appellant, ROBERT OAKLAND FISCHER, respectfully requests this Honorable Court reverse the decision of the Court of Appeals and reinstate the Lapeer County Circuit Court's grant of summary disposition in favor of Defendant.

Respectfully submitted,

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STATE OF MICHIGAN

IN THE SUPREME COURT

RICHARD ADAM KREINER,

Plaintiff-Appellee,

v.

ROBERT OAKLAND FISCHER,

Defendant-Appellant.

/

Supreme Court No. 124120

Court of Appeals No. 225640

Lapeer County Circuit Court
No. 98-026072-NI

PROOF OF SERVICE

STATE OF MICHIGAN)

COUNTY OF WAYNE)

DANIEL S. SAYLOR, being first duly sworn, deposes and says that he is associated with the law firm of GARAN LUCOW MILLER, P.C., attorneys for Defendant-Appellant, Robert Oakland Fischer, and that on January 20, 2004, he caused two copies of the Brief of Defendant-Appellant, the Appellant's Appendix, and this Proof of Service, to be served upon plaintiff's counsel by enclosing same in well-sealed envelopes addressed to:

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SINAS, DRAMIS, BRAKE,
BOUGHTON & McINTYRE P.C.
3380 Pine Tree Road
Lansing, Michigan 48911

with full legal postage thereon and deposited in the United States mail.

DANIEL S. SAYLOR

Subscribed and sworn to before
me on January 20, 2004

Lindsay C. Dugan

Lindsay C. Dugan, Notary Public
Wayne County, Michigan
My Commission Expires: 11/26/07

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